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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

..... TERM 1972

No.

PLAQUEMINE EQUIPMENT & MACHINE COMPANY and THE TRAVELERS INSURANCE COMPANY,
Petitioners

versus

RAYMOND E. NEUMAN, Deputy Commissioner, U. S. Department of Labor, Bureau of Employees' Compensation, etc.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATION TO OPINIONS BELOW

The decision of the district court as well as the Court of Appeals are reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1972. The jurisdiction of this Court is involved under 28 U.S.C. 1254(i).

QUESTIONS PRESENTED

1. Does finding by District Court that Claimant was guilty of fraud and not worthy of belief and that Deputy Commissioner was credulous entitle employer to reversal of Compensation Award unsupported by substantial evidence.

2. Where employer presents unimpeached witnesses who show claimant did not receive injury whereas Claimant's testimony is characterized as fraudulent by reviewing Judge does credibility of evidence rest exclusively with Deputy Commissioner or may judge reverse findings of Deputy Commissioner.

3. Under Substantial Evidence Rule is Appeals Court prevented from reversing District Court in case where claimant is found by court to be guilty of fraud and not worthy of belief.

4. Are presumptions of coverage contained in U.S.L. unconstitutional and violative of constitutional guarantees of due process to every litigant.

5. Does it violate litigant's right to due process under Federal Constitution to permit under Longshoreman's Act appeal but impose penalty upon Employer if he refuses to pay contested compensation during the time that appeal is pending.

6. Is refusal of Appeal Court to grant Temporary Injunction staying execution of Deputy Commissioner Award pending review of appeal which results in Deputy Commissioner proceeding to default Employer and thus illegal coercion and violative of Due Process guarantees of Federal Constitution.

STATUTES INVOLVED

The United States Longshoremen's and Harbor Workers' Compensation Statute, 33 U.S.C. 901, et seq.

STATEMENT OF CASE

The Application for Writ of Certiorari is to review a judgment of the Court of Appeals for the Fifth Circuit which affirmed a judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division in favor of Raymond E. Neuman, Deputy Commissioner and against Plaquemine Equipment and Machine Company and the Travelers Insurance Company denying plaintiff's motion for summary judgment which was in connection with an appeal from the Compensation Order handed down by Raymond E. Neuman, Deputy Commissioner on January 5, 1970. The District Court found that the testimony of the claimant was false and the Deputy Commissioner credulous and unwise but refused to set his award of compensation aside. The parties involved in this appeal are Petitioners, Plaquemine Equipment and Machine Company and The Travelers Insurance Company, and Raymond E. Neuman, Deputy Commissioner.

FACTS OF THE CASE

Robert Flood, claimant in this compensation proceeding, was employed for 15 days by Plaquemine Equipment Company from January 7, 1963, until January 22, 1963. During this period of time he claims to have sustained three accidents resulting in injuries to his back, which accidents he alleges occurred on January 9, January 14

and January 22. After a hearing before the Deputy Commissioner, he was awarded by Compensation Order dated January 5, 1970, compensation benefits for either the January 9, 14 or 22 claimed accidents. In 1960 he was injured while working for another employer and was told by his doctor that he was permanently disabled and could not return to work.

In addition to the compensation claim, Robert Flood filed suit in the Federal District Court against The California Company, in admiralty No. 5954 claiming that as a result of the January 14 accident caused by the negligence of the California Company employees, he received an injury. This case went to trial before Judge Frederick Heebe who found that on the basis of the testimony presented Robert Flood did not sustain an accident on either January 9 or January 14 and that he was not injured while working on those days. The employer and insurer then advised the Deputy Commissioner of the facts established in the record at the Federal Court proceedings which indicated that no accident had been sustained by Robert Flood and that their reliance on Flood's statements of accident having occurred to him was apparently incorrect. The parties requested a hearing before the Deputy Commissioner and subsequently the same witnesses that testified in the Federal Court proceedings also testified before the Deputy Commissioner.

Notwithstanding the impeached testimony of Robert Flood and his witnesses, the Deputy Commissioner found in Flood's favor on all three claimed accident dates applying the presumptions of coverage under the Act. An appeal from this finding was filed with the Federal Court and the matter alloted to Judge Heebe. However,

Judge Heebe by minute entry recused himself since he already had an opinion regarding Flood's credibility. Judge Heebe denied a temporary restraining order while the matter was pending before him, and as a result although employer and insurer had an absolute right of appeal in this matter, the Deputy Commissioner then proceeded to a default hearing before the Federal Court could rule on this appeal. In this appeal, the District court in an opinion by Judge Christenberry found that Flood was a "fraudulent claimant and the Deputy Commissioner credulous," but felt that under the substantial evidence rule, he was powerless to set aside the Compensation Award. He concluded "That the employer and the insurer are caught between a fraudulent claimant and a credulous Deputy Commissioner.

The testimony produced at the hearing before the Deputy Commissioner indicated that not even Flood himself claimed any disability as a result of anything occurring on January 9, and the other witnesses testified that nothing had occurred to Flood on January 9. On January 22, Flood admitted that nothing had occurred to him on that day, and that no accident had occurred, but contended that his only accident was on January 14. All of the witnesses produced by petitioners having no interest in the case testified that nothing occurred to Flood on January 14 and that he was seen by them limping when he first appeared on the job rather than after being on the job a few minutes.

The Fifth Circuit in a per curiam decision affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

I.

Employer and insurer appeal to this Court after having paid $20,544.00 in compensation to a claimant under the longshoremen's Act who in two Federal Court proceedings involving his claim has been characterized as a fraudulent claimant and unworthy of belief. It has been unequivocally established that three years prior to his employment by employer, he had in fact been found to be permanently disabled by his own physician as a result of an accident involving other parties which occurred before he worked for the employer. Judge Herbert Christenberry, the District Judge before whom this appeal was argued, stated in his reasons for judgment dated October 1, 1971 as follows:

> "The Deputy Commissioner has accepted the palpably false testimony of the thoroughly impeached claimant in preference to the testimony of unimpeached disinterested witnesses. It is the court's belief that the claimant has demonstrated he is unworthy of belief and that his testimony is entitled to no weight. The Government, in its brief, attempts to justify and explain the claimant's false statements by attributing them to entrapment by astute counsel in a third-party action. This is not true. The claimant was simply enmeshed in the web of his own deceit. It is clear that in this matter the employer and the insurer are caught between a fraudulent claimant and a credulous Deputy Commissioner."

Notwithstanding the holding that the Deputy Commissioner before whom the testimony was taken was credulous and unwise in determining the credibility in this

case, the District Court and the Fifth Circuit erroneously felt compelled to nonetheless affirm the decision of the Deputy Commissioner. If the District Judge was correct in holding that the claimant's testimony was unbelievable and that he was guilty of fraud and deceitful practices then the record is devoid of any substantial evidence upon which the award can be sustained. The review by the Appellate Court of a Deputy Commissioner's award is not limited to merely determining if there was any evidence in the record to support a Deputy Commissioner's award but it must balance all of the evidence and determine if the award meets the substantial evidence rule.

Not one but two experienced Federal Trial Judges have indicated that Robert Flood is not worthy of belief. And one Federal Judge, Judge Heebe, refused to handle the appeal in the instant case after it was assigned to him because he was so convinced of the unreliability of the claimant's testimony. Judge Brown, the Chief Judge of the Fifth Circuit, commented during oral argument that this was one of the most unusual cases that he had sat on as a judge and that he fully realized that it was extremely difficult to explain to any client how two Federal Judges could hold a man to be guilty of fraud and yet still at the same time affirm a decision in his favor based on his own fraud.

It was error of the Fifth Circuit as well as the District Court to feel that Congress and the Supreme Court had so shackled their right to review rulings of the Deputy Commissioner that even in a case as strong as this they could not reverse the Deputy Commissioner. Yet this same Fifth Circuit in a previous decision in the case of Goins v. Noble Drilling Corporation, 397 F.2d 392 (5th Cir.

1968) speaking through Judge Ainsworth stated as follows:

> "The scope of judicial review of the Deputy Commissioner's findings of fact in a Longshoremen's Act case is governed by the Administrative Procedure Act, 5 U.S.C. 1001, et seq., and this standard is that findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. *O'Leary v. Brown-Pacific-Maxin, Inc.*, 340 U.S. 504, 95 L.Ed. 483 (1951) . . . *The review, however, is not to be a mere rubber stamping of the Deputy Commissioner's order when the reviewing court is unable to conscientiously conclude that the evidence supporting such decision is substantial.* (Italics ours) *NLRB v. O. A. Fuller Super Markets, Inc.*, 5th Cir. 1967, 374 F.2d 197.

This court in the case of *O'Leary v. Brown-Pacific-Maxin, Inc.*, 340 U.S. 504 (1951) followed the same standard for judicial review of administrative decisions pursuant to the administrative procedures Act and the opinion of the court in *Universal Camera Corporation vs. NLRB*, 340 U.S. 474 (1951). The Court speaking through Mr. Justice Frankfurter stated in the Universal Camera case as follows:

> "It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application . . .
>
> Whether or not it was ever permissible for

> Courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, *the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record.* (Italics ours)

> Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision *is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's View.*" (Italics ours)

Furthermore, in the case of *NLRB vs. Walton Manufacturing Company*, 396 U.S. 404 (1962) this Court clearly indicated in its opinion as follows:

> "The test in the Tex-O-Can opinion for reinstatement cases is that the employer's statement under oath must be believed unless there is impeachment of him or substantia contradiction or if there are circumstances that raise doubts they must be inconsistent with the positive sworn evidence on the exact point. But the examiner—the one whose appraisal of the testimony was discredited by the Court of Appeals in the Florida Citrus Canners Coop case—sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records. As we said in the Universal Camera case:

> "The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case."

Here, as in the Walton case, there was impeachment of the claimant himself and the doubts that were raised as a result of his impeachment and statements made by him were doubts so strong that the Federal reviewing Judge found him unworthy of belief and guilty of deceit and fraud. Certainly, this Court must have under those circumstances intended in the Universal Camera case that a reviewing Judge making such a finding of the claimant himself would have the right to reverse a "credulous and unwise" Deputy Commissioner's finding. This has been recognized in the *Goins v. Nobles Drilling Company* case, supra, wherein the Court indicated that the reviewing court is not a mere rubber stamp of an agency decision when after full review of the record, including the evidence opposed to the agency's view, the Court is unable to conclude that the evidence supporting the decision is substantial. See also *Victor Products Corporation vs. NLRB*, 208 F.2d 834 (D.C. Cir. 1953); *Pistorio vs. Einbinder*, 351 F.2d 204 (1965); *Japan Central Exchange vs. Pillsbury*, 106 F. Sup. 727.

What case cries out for reversal more so than a case where the claimant has been found guilty of fraud, deceit and is unworthy of belief? In *United States vs. Profaci*, 168 F. Sup. 631 the Court defined fraud as follows:

> "Fraud connotes purjury, falsification, concealment and misrepresentation."

This type of conduct when found to be present is sufficient to set aside judgment of any court or tribunal and is sufficient to even set aside contracts. *Hilton vs. Guiot*, 159 U.S. 113, 40 L.Ed. 95; *House vs. McMullen*, 100 P. 344.

The rule of law as stated in 100 Corpus Juris Secundum, Workmen's Compensation Section 651 is as follows:

> "Under statutes prevailing in some jurisdictions, a compensation award may and should be set aside for fraud . . ."

Further, in *Hanna, Federal Remedies for Employee Injuries*, 1955, the author when speaking of the scope of review under the Longshoremen's Acts states as follows:

> "The decision of the Deputy Commissioner is final, in absence of fraud or mistake, unless it is unsupported by substantial evidence on the record as a whole."

II.

Under 33 U.S.C. 920 and 921 certain presumptions of coverage for injuries are set out and also limitations placed upon review of compensation orders by Deputy Commissioners. As a result of these provisions of the statutes, decisions are permitted to be made by Deputy Commissioners which as in the instant case award compensation based upon scant evidence of an injury and they rely on the presumption of the statute and upon a record which is later described by a Federal Judge as based on fraudulent and untrue testimony. Then when the employer attempts to appeal to have the record reviewed by a District Judge, that Judge feels powerless to under the

statute to allow a temporary restraining order pursuant to Section 921 pending the appeal. The Deputy Commissioner in this case when the Court refused the temporary restraining order then proceeded to hold a default proceeding and found the employer and insurer guilty of a failure to pay under his compensation order, even though they had validly appealed the compensation order to the District Court, and imposed a 20% penalty upon the employer and the insurer. This is a penalty imposed solely because the appeal was taken.

We feel these actions by the Deputy Commissioner exhibit a zeal to coerce and/or compel compliance with his orders and to deny in fact the right of legitimate appeal. These actions and the constitutional framework within which these actions are permitted, i.e. Sections 33 U.S.C. 920 and 921 are violative of constitutional guarantee of due process under the law under the Fifth Amendment.

This Court in referring to state action of a similar vein under the Fourteenth Amendment had no difficulty in striking down the state action as violative of due process. In the case of *Yick Wo vs. Hopkins*, 118 N.S. 356 30 L.Ed. 220 stated in its opinion as follows:

> Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

It is submitted that by the denial of the temporary restraining order the District Court was in error and pre-

judiced employer's and insurer's right of appeal in this case, but even more so that the presumptions under the statute relied upon by the District Court are unconstitutional and are violative of due process of equal parties appearing in the hearing. Furthermore, the District Court in Alabama in the case of *Jones vs. Sheppard*, 20 F. Sup. 345 (1937) stated:

> "The insolvency of the claimant is not a sufficient reason for granting of an injunction, but if the complainant is not liable under the Act, then to require him to pay the award would work an irreparable injury because it would compel him to pay money to a claimant to whom it was not legally responsible, and would be without authority of law."

It is submitted that the actions of the Deputy Commissioner and the District Court violated the constitutionally guaranteed right of due process of employer and insurer. Further, the section of the act which presumes coverage in favor of the claimant is unconstitutional and violative of the Due Process clause of the 5th Amendment.

III.

CLAIMED ACCIDENT OF JANUARY 9, 1963.

When questioned regarding the January 9, 1963 accident, Mr. Flood stated at page 71:

> "I think I have stated as before, that an accident, as I understand it, is something unforeseen happening, such as a fall or being hit with an object over which you have no control, etc. Now, an incident is something that occurs and inasmuch as the difference between an

accident and an incident, are reported that in assisting to lifting these, thsi 2 inch pipe, 40 foot long over this navigation standard I experienced a pain in my back.

Q: While you were lifting the two inch pipe, the joint of pipe, did you experience any trauma to your body at that time while you were lifting?

A: Yes, in the lower area of my back and just general area down here with a slight pain in my leg; just short of a little shooting pain."

However, at his trial, his own attorney had asked him the same question:

"Q: While performing that task, did you experience any trauma to your body?"

And his answer was:

"A: No, Sir. I didn't experience anything to my body at that time. Subsequently, within an hour my back became a little uncomfortable."

Further, at page 74 of the transcript, Mr. Flood indicated that when he went back to work on January 12 his back was in a normal condition. In fact, at page 75 of the transcript, he stated that before the incident occurred on January 14 with the barrell, the condition of his back was "no inconvenience, no disability and no discomfort." (Tr. p. 75).

The foreman who actually was in the field at the time that Mr. Flood reported on January 9 for work, Jerry Gardelle testified in this case. Mr. Gardelle was no longer employed by Plaquemine Equipment Company and at the

time of the hearing before Mr. Neuman was employed by Ocean Sciences Incorporated. In his testimony at page 122 of the transcript, he testified that Mr. Flood did not perform any work on January 9, 1963. In his own words, Mr. Gardelle describes the incident at pages 122 and 123:

"A: Well, he come there and I was running some 2 inch line for gas line for a water fire fight-inch pipe underneath the deck and we was going to start carrying some down the steps and I told Mr. Flood, I said for him to carry some pipe underneath the deck. He is a welder but sometimes when he wasn't welding nothing, we had welders' help carry the pipe. And so he said that his back was hurt and that he couldn't carry that pipe. And I said, 'how did you hurt your back?' He said "on some other job". I said, 'well, where you got to go underneath that deck, you can't get underneath there with your back hurting'. Because it was hard climbing if your back was in good shape so he had his tool box, we all were standing around there and a boat was coming and I told him, I said, 'Flood, you just as well get on that boat and go back on in." And I had help take his tool box down to the bottom of the catwalk and the boat came and he went on back in."

Mr. Gardelle confirmed that that day Mr. Flood had not performed any work on that structure and that as soon as he came out to the structure, he was sent back in. This witness, Jerry Gardelle, no longer an employee of Plaquemine Equipment Company had no interest whatsoever in the outcome of this case. His testimony is clear and unquestioned that on January 9, Mr. Flood performed no work whatsoever for Pemco and in fact informed Mr. Gardelle that he had hurt his back while working for

someone else. However, after being sent in by Gardelle, he seized on this opportunity and went into the Plaquemine office and reported to them that he had hurt his back on the job and thus obtained a first report of injury from his employer based upon his own statement, and he was examined by a physician who found no disability.

The other job that Mr. Flood was referring to where he was hurt was a back condition which occurred in 1960, while working for Clement Betpouey when he sustained a ruptured intervertebral disc requiring a laminectomy to be performed by Dr. Accardo in 1960. In fact, he was paid workmen's compensation disability benefits on the basis of being permanently and totally disabled in the 1960 accident. Mr. Flood was never discharged by Dr. Accardo for the 1960 incident and Dr. Accardo was of the opinion that Mr. Flood was permanently and totally disabled from performing manual work as a result of the 1960 accident.

Notwithstanding Mr. Flood's own statement that he did not sustain any trauma on the 9th and that he was on the 12th completely recovered from anything that occurred on the 9th, and Gardelle's testimony that nothing happened to Flood on the 9th, the Deputy Commissioner found he was entitled to compensation for his incident on the 9th. This finding is totally and completely devoid of any evidence to support it.

JANUARY 14th INCIDENT

At page 31 of the transcript, Mr. Flood describes the January 14th accident as one which occurred while he was working on a California platform with two California

employees, Carl Rihard and Billy Carter. They were in the process of unloading tools loaded into a barrell with a hoist when Billy Carter who was operating the hoist let it down too fast and Carl Richard pushed on the barrell propelling it into Flood and knocking him backwards off his feet and pinning his right foot under him. The barrell supposedly fell on top of him. He then describes in detail a conversation with Carter and Richard relative to the injury and their questioning of him following the accident However, Billy Carter at page 142 of the transcript testified that he recognized Mr. Flood as the person at the hearing and that he recalled seeing Mr. Flood on the platform on Block 41 A structure. He indicated that the first time that he saw Mr. Flood he was limping on one of his legs on the platform and that was the first time that he came out to work. He denied unequivocally that he ever witnessed an accident where Mr. Flood was struck by a barrel, knocked over backwards and fell down on to the platform. And further denied that Mr. Flood had ever reported to him that he had an injury (Tr. pp. 142-143).

The other California Company former employee is now employed as Chief Criminal Deputy Sheriff in Iberville Parish Sheriff's Department. He has been employed in that capacity for a period of 5-1/2 years prior to the hearing. At page 149 of the transcript he testified clearly and unequivocally that he did not witness any accident involving Mr. Flood on January 19, 1963.

Further that Mr. Flood had never informed him that he, Richard, had shoved a barrel into him and knocked him down. (Tr. pp. 150-153).

Neither of these two witnesses have any interest whatsoever in this case or in the employment by Robert Flood by Plaquemine Equipment Company. Their testimony was exactly the same testimony that they gave in a Federal Court trial brought by Flood against The California Company. In that case, copy of the judgment and transcript which appears as an exhibit, Judge Fred Heebe in his decision after hearing the same witnesses who testified before Commissioner Neuman found the testimony of Gerald Gardelle credible and also found credible testimony of both Carter and Richard. In his opinion Judge Heebe stated:

> "We find that at no time on January 9, 1963, did the plaintiff perform one minute's work for PEMCO, and there certainly was no accident involving the plaintiff on that day. However, Flood, unknown to Gardelle, went into the PEMCO office and reported that he had hurt his back. The office personnel suggested that Flood go in to see Dr. Ettinger.
>
> Flood testified that another member of the crew on the date of the alleged accident (January 14, 1963) was Dudley Doucet. We find that Dudley Doucet was *not* a member of the crew on the "A" Structure in Block 41 on January 14, 1963, for the following reasons:
>
> (a) Carl Richard and Billie Carter both deny any accident or any conversation between Robert Flood and Dudley Doucet on the date of the alleged accident;
>
> (b) The PEMCO time tickets for January 14, 15, 16, 17, 18, 19, 22 and 23 of 1963 were executed in Robert Flood's handwriting which is a block print style. These tickets reflect that on

January 14, 1963, the date of the alleged accident, Dudley Doucet was not physically present on the platform nor did he perform any work whatsoever for the Company on January 14, 1963. Actually, Harold Shelton was the helper out on the platform;

(c) Flood contended that Dudley Doucet came out to the platform prior to the accident to replace Harold Shelton because Shelton was required to attend a funeral of a relative. The defendant has filed a certified copy of the death certificate of Shelton's uncle showing that he did not die until 11:00 P.M. on January 16, 1963;

(d) Dudley Doucet had previously given two depositions in this case, one in New Orleans and one in Houston, Texas. The statements introduced into evidence established that the first statement obtained from the witness several months after the accident indicate:

> '. . . when I came up on the platform, Flood was limping about and he was not working. He said he fell and hurt himself. Flood stayed in the bunkhouse and sleeping quarters most of the day.'

The second statement taken several years later indicate:

> 'Bob was walking around in a small area near some stacked pipe complaining of his back, that he said he had just injured when he was knocked down. He said that a California Company employee pushed the 55 gallon drum.'

However, when Dudley Doucet testified in Court, his answer was different:

'I can't remember what Flood told me about how he hurt himself';

(e) The actual Company records reflect that Dudley Doucet was *not* on the platform involved in this case on January 14, 1963, but that Dudley Doucet was in fact working with Flood on January 22, 1963, when Flood may have hurt his back while pulling on a 36-inch pipe wrench making a connection."

This appeal initially was allotted to Judge Heebe, but as this record will show on June 3, 1970, Judge Heebe entered the following order for reallottment in this case:

"This Court has heard Robert Donald Flood testify under oath and has a fixed opinion on the credibility of Mr. Robert Flood's testimony, and in fairness to all parties and in the interest of justice, this section of the Court must recuse itself."

Here we have a claimant whose credibility and very testimony has been shattered and destroyed in a Federal Court trial and also in the proceedings before the Deputy Commissioner.

ALLEGED INCIDENT ON THE 22ND

Flood in his testimony at page 23 of the transcript stated that he left the job for the last time on January 22. He attempted to deny that he had had pains in his back prior to the 22nd and his testimony at pages 63 and 64 of the transcript must be examined. In this regard, at transcript page 65 he was read the question from his previous sworn testimony in the Federal Court proceedings when he was asked by his attorney:

"Q: Were you able to perform your normal duties on that day, on January 21, 1963?

A: I did in a restricted manner. I wouldn't say that would have been satisfactory on a continued basis."

Q: Now, does that refresh your memory as to how you were working on the 21st?

A: That doesn't refresh my memory in any respect because it was just a choice of words and some people have different choices of words. I can sit here right today and say that oh, yes, I was restricted. I couldn't hardly walk, but I couldn't tell you to the exact degree just how much restricted I was . . . Well in other words, I'll put it this way. I was uncomfortable. In other words I wasn't free from pain and it is possible that I could have been restricting myself to certain things."

Finally, after being confronted with this testimony, Mr. Flood at transcript page 67 testified:

> "As I recall it, as I stated before, my back, the tension in my back built up during the day and at night, yes, but when I woke up the next morning—when I said more or less I went out there to work, just more or less is just an expression. I was out there . . .

Then Mr. Cummings at page 42, continued the questions said:

Q: Did you complete your work that day and your answer was, 'No, as the day wore on my back became gradually worse until I was in a position that I couldn't straighten myself up and

generally it was getting, becoming unbearable."

And later he testified:

Q: Now, from the time you first started work at 8:00 a.m. that morning on the 22nd, you had this back pain that gradually got worse; is that correct?

A: Yes, it started to build up during the day and that's when it finally got unbearable. That's when I had to quit.

Then finally Mr. Flood was asked at page 68 of the transcript the following question:

"Q: Now, Mr. Flood, do you remember when your attorney asked you previously whether or not you reinjured your back in an accident on January 22nd and you answered him previously.

Q: Do you remember your answer at that time?

A: No, I didn't reinjure my back.

Q: You did not reinjure your back on January 22nd; is that correct?

A: That's true.

And at page 69 of the transcript:

Q: But on January 22nd, you did not reinjure your back; is that correct?

A: I didn't say I didn't reinjure it. I said there was no accident. Is that correct? Is that my testimony?

Q: No, sir. I am asking what is your testimony today?

A: That there was no accident.

Q: There was no accident?

A: On January 22nd?

Q: On January 22nd?

A: That's correct."

Flood in his own statement indicates that he had no accident on January 22. Again, faced with this testimony in the record, the Deputy Commissioner still nonetheless holds that Mr. Flood had an accident on January 22nd and that this would be sufficient for him to receive compensation under the Longshoremen and Harbor Workers' Act.

ACTUAL CAUSE OF FLOOD'S CONDITION

In his testimony Robert Flood admitted that he had suffered from a back condition since 1947, and that in 1960, he received an accident which resulted in a laminectomy being performed on him. The doctor who performed this laminectomy testified at the hearing and indicated that he had never released him for treatment and that in his opinion he was disabled in 1960, as well as in 1963, when he later saw him. Dr. Accardo in his testimony at page 216 of the transcript indicated that when he first saw Flood on February 18, 1960, that he was completely disabled and that he recommended that he be hospitalized. Later, at page 219 of the transcript, Dr. Accardo stated:

"A: That's right. At no time have I ever felt that this man should go to the type of work he was doing before.

Q: Why is that doctor?

A: Because I thought he was disabled. If I were to examine this man, say for an employment agency or insurance company to be employed, I would not pass him.

Q: Why?

A: Because I thought he was totally disabled. When I infered that I, as far as my recollection in this case, that I don't think that I need to go into all of the details, because my opinion has been since the very first time that I saw him until the last time that I saw him, that this man was totally disabled, and I have never felt that he should have gone back to work."

Further at page 221 of the transcript, Dr. Accardo indicates why it is that Mr. Flood did not suffer an accident or an injury while working within the course and scope of his employment for Plaquemine Equipment Company. Dr. Accardo stated:

"I don't think that he ever really was rehabilitated from his original complaint when I saw him in May of 1960, and that the so called re-occurrences of injuries were not really injuries, other than it was just like if in any rehabilitation a guy goes on the next elevation of activity and finds he has pain and he can't proceed in that area."

Dr. Accardo's testimony was affirmed when an exami-

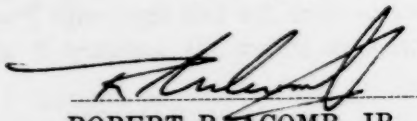
nation was made of Flood's employment prior to the few days that he worked for Plaquemine Equipment Company in 1963. At page 50 of his testimony he indicates that he worked for A-1 & Boiler Works for a couple of hours in their shop, but that his back started to bother him and he therefore informed the employer that he was unable to work because of his back and he signed a release indicating he did not injure his back at his shop. He then later went to work for two days with Plaquemine Equipment Company before his January 9 alleged accident.

CONCLUSION

The issues involved in this case have implications which go far beyond the interest of the particular litigants. It is not possible for a system of *EQUAL JUSTICE* under the law to continue if preferences are given to any class of litigant to the detriment of the other. Neither is it possible for our system of Justice to continue if the entire foundation of the system, the Courts, are so shackled that they are not permitted to reverse an improper abuse of power merely because it is exercised by an Administrative agency rather than by another lower court. Congress did not intend under the Administrative Procedures Act to eliminate Appeals of Deputy Commissioners orders, and to deny a reversal in a case where the reviewing Federal Judge finds fraud since this would be to deny any right of review.Due process demands that all administrative agencies orders are subject to an appeal without any coercion by the agency to forego the appeal. Due Process demands that all litigants be treated equal and any presumptions in favor of one litigant or the other be eliminated. The decision of the Fifth Circuit Court of Appeals should be reversed and the District Court directed to enter judg-

ment reversing the decision of the Deputy Commissioner awarding Compensation to the claimant Mr. Flood and entering an injunction preventing any further actions of the Deputy Commissioner to attempt to enforce the compensation award.

Respectfully submitted,

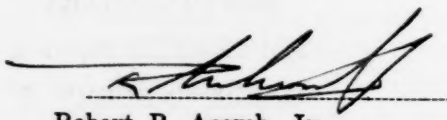


ROBERT B. ACOMB, JR.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street
New Orleans, Louisiana 70112
Counsel for Petitioners

CERTIFICATE

I certify a copy of the foregoing petition for certiorari and accompanying brief has been served on opposing counsel by depositing same in the U.S. Mail postage prepaid.

This 7 day of July, 1972.



Robert B. Acomb, Jr.

APPENDIX

SECTION "A"

No. 70-67

CIVIL ACTION

MINUTE ENTRY

SEPTEMBER 29, 1971

CHRISTENBERRY, J.

PLAQUEMINES EQUIPMENT & MACHINE COMPANY and THE TRAVELERS INSURANCE COMPANY

vs.

RAYMOND E. NEUMAN, DEPUTY COMMISSIONER, ETC.

This matter came on on a former day for hearing on motion of plaintiffs for summary judgment, at which time the court took time to consider and counsel were given time to file briefs. Now, after due consideration of the argument of counsel, and the briefs,

IT IS ORDERED that the motion of plaintiffs for summary judgment be and it is hereby denied.

REASONS

In this matter the court is limited to deciding whether the order of the Deputy Commissioner is supported by substantial evidence.

This court cannot say that the order of the Deputy Commissioner is not supported by substantial evidence if such evidence is believed. However if this court had the authority to judge the credibiilty of the witness, particularly that of the claimant, the court would grant the motion for summary judgment and set the order aside as not being supported by substantial credible evidence. The Deputy Commissioner has accepted the palpably false testimony of the thoroughly impeached claimant in preference to the testimony of unimpeached disinterested witnesses.

It is the court's belief that claimant has demonstrated he is unworthy of belief and that his testimony is entitled to no weight. The Government, in its brief, attempts to justify and explain the claimant's false statements by attributing them to entrapment by "astute counsel" in a third party action. This is not true. The claimant was simply enmeshed in the web of his own deceit. It is clear that in this matter the employer and its insurer are caught between a fraudulent claimant and a credulous Deputy Commissioner.

Robert B. Acomb, Jr., Esq.

Leavenworth Colby, Esq.

James D. Carriere, Esq.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

June 12, 1972

Mr. Robert B. Acomb, Jr.
Attorney at Law
225 Baronne St.—28th Floor
New Orleans, La. 70112

No. 71-3460—Plaquemines Equipment & Machine Co., et al v. Raymond E. Neuman, etc.

MANDATE STAYED TO: July 12, 1972

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, and judgment which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By_____
Deputy Clerk

enc.

cc (LETTER ONLY)
Mr. Gerald J. Gallinghouse
Messrs. Leavenworth Colby
Alan Rosenthal

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3460

PLAQUEMINES EQUIPMENT & MACHINE COMPANY and THE TRAVELERS INSURANCE COMPANY,
Plaintiffs-Appellants,

versus

RAYMOND E. NEUMAN, Deputy Commissioner, U. S. Department of Labor, Bureau of Employees' Compensation, etc.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(May 30, 1972)

Before BROWN, Chief Judge, RIVES and CLARK, Circuit Judges.

PER CURIAM: Six years after a Deputy Commissioner had entered a continuing compensation award in favor of claimant, a District Court, considering a third-party tort suit brought by the claimant allegedly arising out of the same episode, found that the plain-

tiff (claimant) was entirely unworthy of belief and that the injury-producing event had not, in fact, occurred. Accordingly, the employer and his compensation insurer petitioned the Deputy Commissioner under 33 U.S.C.A. § 922 to reconsider and set aside the never appealed 1964 award. The Deputy Commissioner declined to modify the 1964 order as requested,[1] the District Court upheld that determination, and this appeal ensued. We affirm.

Despite the District Court's holdings in the third party suit, the Deputy Commissioner chose to believe the claimant. The District Court reviewing that decision — and it was a different District Judge than the one in the third party suit — agreed with the first District Judge that the claimant's credibility had been completely discredited and that the Deputy Commissioner's credibility selection was tenuous, credulous and unwise,[2] but he refused to set aside the award since, given the credibility choice which the Deputy Commissioner had made, and which was *exclusively* within his province to make,[3] there

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[1] The 1964 order was modified to correct the description of the accident which the Deputy Commissioner found to have occurred. The 1964 order recited facts and dates relating to an incident allegedly occurring on January 9, 1963. The 1970 order amended the previous order by reciting facts relating to an occurrence of January 14, 1963. The January 14 incident was the one which had been alleged by the claimant to have produced the injuries. The employer's answer to the 1964 proceedings had admitted the occurrence of January 14.

[2] The District Court's order stated,

> "The Deputy Commissioner has accepted the palpably false testimony of the thoroughly impeached claimant in preference to the testimony of unimpeached disinterested witnesses.
> It is the Court's belief that claimant has demonstrated he is unworthy of belief and that his testimony is entitled to no weight. * * * The claimant was simply enmeshed in the web of his own deceit."

[3] See, NLRB v. Walton Mfg. Co., 1962, 369 U.S. 404, 407-08, ... S.Ct. ....., ..., ... L.Ed.2d ....., ...; Calbeck v. Strachan Shipping Co., 5 Cir., 1962, 306 F.2d 693, 695, *cert. denied*, 1963, 372 U.S. 954, ... S.Ct. ....., ... L.Ed.2d 587, 590.

was substantial evidence in the record as a whole to support the Deputy Commissioner's finding that the claimant had been injured on the job on January 14, 1963 and to sustain the consequent award.[4]

The District Court's holding correctly applied the law.

AFFIRMED.

[4] Not the least significant piece of evidence was the employer's answer to the 1964 proceedings, admitting the injury and occurrence of January 14, 1963.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term. 1971

No. 71-3460

D. C. Docket No. 70-67

PLAQUEMINES EQUIPMENT & MACHINE COMPANY and THE TRAVELERS INSURANCE COMPANY,
Plaintiffs-Appellants,

versus

RAYMOND E. NEUMAN, Deputy Commissioner, U. S. Department of Labor, Bureau of Empolyees' Compensation, etc.,
Defendant-Appellee.

Appeal from the United States District Court for he Eastern District of Louisiana

---

Before BROWN, Chief Judge, RIVES and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

May 30, 1972

Issued asMandate:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-54

PLAQUEMINE EQUIPMENT & MACHINE COMPANY AND THE TRAVELERS INSURANCE COMPANY, PETITIONERS

v.

RAYMOND E. NEUMAN, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. In 1964 the Deputy Commissioner of the Bureau of Employees' Compensation, Department of Labor, awarded claimant Robert Flood compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*) for a work injury sustained by him on January 14, 1963, while in the employ of petitioner, Plaquemine Equipment

and Machine Company. Seven years later, relying upon a determination in a third party tort suit that the injury producing event had not in fact occurred, the petitioner employer and its compensation carrier, petitioner Travelers Insurance Company, sought to have the unappealed award reconsidered and set aside. The Deputy Commissioner refused to modify the award and the district court, expressly refusing to find that the order of the Deputy Commissioner was not supported by substantial evidence, upheld that decision (Pet. App. 28-29). On appeal, the court of appeals unanimously affirmed in a *per curiam* opinion, holding that there was substantial evidence in the record as a whole to support the Deputy Commissioner's finding that the claimant had been injured on the job (Pet. App. 32-34). A timely petition for writ of certiorari was filed July 10, 1972.

2. An award of benefits under the Act must, of course, be affirmed if there is substantial evidence in the record as a whole to support the Deputy Commissioner's determination.[1] *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504; *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359. Both courts below, applying the proper test, concluded that the award here was supported by substantial evidence. This question does not warrant further review by this Court.

It is therefore respectfully submitted that the petion for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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[1] And, of course, the credibility of witnesses in this proceeding is determined by the Deputy Commissioner.

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